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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/784,676	02/23/2004	Katherine M. Burnett	J&J-1995CNT	1891
27777	7590	07/14/2006	EXAMINER HAND, MELANIE JO	
PHILIP S. JOHNSON JOHNSON & JOHNSON ONE JOHNSON & JOHNSON PLAZA NEW BRUNSWICK, NJ 08933-7003			ART UNIT 3761	
PAPER NUMBER				

DATE MAILED: 07/14/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/784,676	<b>Applicant(s)</b> BURNETT ET AL.	
	<b>Examiner</b> Melanie J. Hand	<b>Art Unit</b> 3761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 11 April 2006.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-5 and 7-14 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-5, 7-14 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Response to Arguments***

Applicant's arguments, see Remarks, filed April 11, 2006, with respect to the rejection(s) of claim(s) 1-3 and 7-11 under 35 U.S.C. 102 and the rejection of claim have been fully considered and are persuasive. Therefore, the rejection has been withdrawn. However, upon further consideration, a new ground(s) of rejection is made in view of newly found prior art references.

### ***Terminal Disclaimer***

The terminal disclaimer filed on April 11, 2006 disclaiming the terminal portion of any patent granted on this application which would extend beyond the expiration date of U.S. Patent No. 6,719,740 has been reviewed and is accepted. The terminal disclaimer has been recorded.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.

Art Unit: 3761

2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-5 and 7-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Seneca (U.S. Patent No. 5,219,340) in view of Thompson (U.S. Patent No. 3,929,135).

With respect to **Claims 1,2,3**: Seneca teaches a colloidal oatmeal solution applicator (delivery system) comprising a colloidal oatmeal solution (topical skin care agent-claims 1,2) held between layers of porous material 14 (i.e. having apertures therein), one layer defining a top layer and one layer defining a bottom layer, having edges sealed together to form seam 16 (Column 4, lines 1-30) The seamed layers 14 define walls that define a cavity therebetween (pouch). The colloidal oatmeal solution comprises powdered or pulverized oatmeal contained within the pouch.

Seneca teaches a porous (apertured) material for said top and bottom layer but does not teach that said layers have protuberances therein. Thompson teaches an apertured film wherein said apertures comprise inwardly facing tapered capillaries (protuberances). Thompson teaches that this structure facilitates the rapid intake of fluids and is useable as a towel or bandage material or the like (i.e. a wrapping material), therefore it would be obvious to one of ordinary skill in the art to use the apertured film material taught by Thompson for the porous material in the applicator taught by Seneca to allow rapid intake of water, and thus rapid production of the colloidal oatmeal solution, which in turn allows more rapid use or relief for the user. The combined teaching of Seneca and Thompson would thus teach both a top and bottom layer comprising an apertured film having protuberances therein that extend toward the pouch defined between said top and said bottom layer. (claim 3)

With respect to **Claims 4,11**: Seneca does not teach a particular porous material. The film taught by Thompson is comprised of an apertured film laminated to a polyethylene base film (synthetic fiber hydrophobic nonwoven material).

With respect to **Claims 5,14**: The combined teaching of Seneca and Thompson teaches an apertured porous film and teaches that “an example of a suitable liquid impervious material is low density polyethylene...” and therefore does not teach a bicomponent spunbond nonwoven. It would be obvious to one of ordinary skill in the art to substitute a bicomponent PE/PET film as such films are known in the art for their suitability for use in liquid intake and transfer films, and since such films comprise a percentage of polyethylene, such a bicomponent film would be acceptable for use as the apertured film taught by Thompson. Regarding the limitation that the bicomponent be a spunbond film, Examiner regards this as product-by-process claim language, as the end product of the combined teaching of Seneca and Thompson wherein a bicomponent spunbond film is used as the apertured porous material would be identical to the end product wherein the bicomponent film is produced by another materially different process. Rejection under 35 U.S.C. 103 is indicated where prior art discloses product that appears to be either identical with or only slightly different from product claimed in product-by-process claim. See *In re Marosi*, 710 F.2d 799, 218 USPQ 289 (Fed. Cir. 1983) and *In re Thorpe*, 777 F.2d 695, 227 USPQ 964 (Fed. Cir. 1985). See also MPEP § 2113.

With respect to **Claims 7,8**: Thompson teaches an apex diameter 28 (aperture) size range of 0.013 - .051 cm, or 130 – 510 microns, and therefore does not teach size values in the ranges set forth in claims 7 or 8. However, applicant has not established sufficient criticality for the aperture size ranges in claims 7 and 8, therefore they are considered herein to be an

optimization. It would therefore be obvious to one of ordinary skill in the art to modify the size of the apertures taught by Thompson so as to fall within the ranges set forth in claims 7 and 8 as modifying the aperture size will effect equal or improved function of the applicator taught by the combined teaching of Seneca and Thompson.

With respect to **Claims 9,10**: Thompson teaches an aperture density of 5-231 apertures per square centimeter, a range that contains values that satisfy the ranges set forth in claims 9 and 10.

Claims 12-14 rejected under 35 U.S.C. 103(a) as being unpatentable over Seneca (U.S. Patent No. 5,219,340) in view of Thompson (U.S. Patent No. 3,929,135) as applied to claims 1-5 and 7-11 above, and further in view of Ahr et al (U.S. Patent No. 4,988,344).

With respect to **Claims 12,13**: The combined teaching of Seneca and Thompson does not teach that the colloidal oatmeal solution (topical skin care agent) is contained in a water-soluble film. Ahr teaches an apertured film comprising tapered capillaries as taught by Thompson and further having water-soluble natural fibers (e.g. cellulose derivatives-claim 13) entangled with the apertured film, thus creating a water-soluble layer adjacent the pouch in which the colloidal oatmeal solution is contained. Ahr teaches that such a film enhances liquid transfer, thus it would be obvious to one of ordinary skill in the art to employ the porous apertured film having a water-soluble component as taught by Ahr as the porous material in the applicator taught by the combined teaching of Seneca and Thompson to allow rapid intake of water, and thus rapid production of the colloidal oatmeal solution, which in turn allows more rapid use or relief for the user.

With respect to **Claim 14**: The combined teaching of Seneca and Thompson teaches an apertured porous film and teaches that “an example of a suitable liquid impervious material is low density polyethylene...” and therefore does not teach a bicomponent spunbond nonwoven. It would be obvious to one of ordinary skill in the art to substitute a bicomponent PE/PET film as such films are known in the art for their suitability for use in liquid intake and transfer films, and since such films comprise a percentage of polyethylene, such a bicomponent film would be acceptable for use as the apertured film taught by Thompson. Regarding the limitation that the bicomponent be a spunbond film, Examiner regards this as product-by-process claim language, as the end product of the combined teaching of Seneca and Thompson wherein a bicomponent spunbond film is used as the apertured porous material would be identical to the end product wherein the bicomponent film is produced by another materially different process. Rejection under 35 U.S.C. 103 is indicated where prior art discloses product that appears to be either identical with or only slightly different from product claimed in product-by-process claim. See *In re Fitzgerald, Sanders, & Bagheri*, 205 USPQ 594 (CCPA 1980).

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Melanie J. Hand whose telephone number is 571-272-6464. The examiner can normally be reached on Mon-Thurs 8:00-5:30, alternate Fridays 8:00-4:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tatyana Zalukaeva can be reached on 571-272-1115. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Melanie J Hand  
Examiner  
Art Unit 3761

MJH

TATVANA ZAI UKAEVA  
SUPERVISORY EXAMINER

